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Part IV

Environmental Protection Agency

40 CFR Parts 261, 266 and 271
Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Exclusions; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 261, 266, and 271

[FRL-4098-4]

RIN 2050-AC85

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Exclusions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is amending the hazardous waste management regulations (40 CFR 261.4(a)) to exclude from the definition of solid waste those coke by-product residues that are recycled by being: (1) Returned to coke ovens as a feedstock to produce coke; (2) returned to the tar recovery process as a feedstock to produce coal tar; or (3) mixed with coal tar prior to coal tar refining or sale. These residues are hazardous because they exhibit the Toxicity Characteristic (TC) of 40 CFR 261.24. This exclusion was proposed on July 26, 1991 (56 FR 35758). The Agency is also excluding the similarly-situated hazardous waste K087 when recycled in this way. These exclusions are conditioned on there being no land disposal of the recycled material. EPA's July proposal also proposed to list as hazardous seven wastes from the production, recovery and refining of coke by-products. EPA will address these listings in a separate final rule to be issued at a later date.

EFFECTIVE DATE: June 22, 1992.

FOR FURTHER INFORMATION CONTACT: Mr. Ron Josephson, Environmental Engineer, U.S. Environmental Protection Agency, Office of Solid Waste (OS-333), 401 M St., SW, Washington, DC 20460, (202)260-4770; or call the RCRA/Superfund Hotline at: (800)424-9346 (toll-free in the U.S.), (800)553-7672 (TDD), or (703)920-9810.

SUPPLEMENTARY INFORMATION:

Preamble Outline

I. Background
- A. AISI Petition
- 1. Basis for Approval of AISI Petition
- 2. Exclusion of Coking Process
- B. Other Coke By-Product Plant Residues Returned to Coke Ovens

II. Basis for Today's Rule
- A. Description of Processes
- 1. The Coking Process
- 2. The Tar Refining Process
- B. Description of By-Product Residues and Recycling Processes
- C. Similarity of Other Coke By-Product Plant Residues to K087

III. Justification for Exclusion from the Definition of Solid Waste
- A. Exclusion for Residues Generated and Recycled at Coke Ovens
- B. Exclusion of Coke By-Products Generated Off-site
- C. Exclusion of Coke By-Product Residues Generated at Tar Refining Sites
- 1. Exclusion of Tar Refining Residues Recycled On-site
- 2. Exclusion of Tar Refining Residues Recycled Off-site
- D. Response to Comments

IV. Relationship to Other Regulatory Programs
- A. Toxicity Characteristic
- B. Burning of Hazardous Waste in Boilers and Industrial Furnaces

V. State Authority
- A. Applicability of Rules in Authorized States
- B. Effect on State Authorization

VI. Regulatory Requirements
- A. Executive Order No. 12291
- B. Paperwork Reduction Act
- C. Regulatory Flexibility Act

I. Background

A. AISI Petition

On May 6, 1987, the Environmental Protection Agency (EPA) published a proposed rule which would expand controls on hazardous waste combustion in boilers and industrial furnaces (52 FR 16982). Because of the implications of this proposed rule on the recycling practices of the iron and steel industry, the American Iron and Steel Institute (AISI) petitioned EPA, requesting that EPA not classify product coke and coal tar that have been produced from decanter tank tar sludge (EPA Hazardous Waste No. K087), as solid wastes. AISI also requested that EPA exclude the mixture of K087 and coal or coal tar from the definition of solid waste when:

(1) K087 is recycled by being applied to coal prior to or just after charging the coal to a coke oven, or

(2) K087 is combined with coal tar prior to its being sold.

Coke produced from K087 is often used as a fuel and could be classified as a solid waste and a hazardous waste since it is a fuel produced from or otherwise containing hazardous waste K087 (RCRA 3004(q)(1)(a); 40 CFR 261.2(c)(2)). Coal tar, a by-product from coke production that has a high fuel value, is refined into other fuel products and also may contain K087 materials. These waste-derived materials had previously been exempt from substantive regulation under 40 CFR 261.6(a)(3)(vii). However, AISI requested that the coke and coal tar produced from coal containing decanter tank tar sludge (K087) be excluded from the definition of solid waste in § 261.4(a) since the addition of K087 sludge does not affect the concentration of hazardous constituents in the product coke or coal tar. AISI submitted data to EPA on metals and organic constituents in coke, coal tar, and decanter tank tar sludge. The data contained analyses for the following metals—arsenic, cadmium, chromium, lead, and mercury, and for the following organics—anthracene and phenanthrene, benzo(a)anthracene and chrysene, benzo(a)pyrene, fluoranthene, pyrene, naphthalene, and phenol.

After review of these data, EPA proposed the exclusion (52 FR 16982, May 6, 1987), and took final action on February 21, 1991 (56 FR 7203). (This action came about as part of a larger rulemaking establishing emissions standards for boilers and industrial furnaces burning hazardous waste.)

EPA determined that:

1. Basis for Approval of AISI Petition

(1) The recycling of tar decanter sludge by application to the coal charge does not appear to have a significant effect on the chemical composition of end product coke;

(2) The organic chemical composition of the tar decanter sludge does not appear to be significantly different from that of the coal tar; and

(3) The concentration of one metal (lead) in the sludge appears to be slightly higher than in the coal tar. However, the increase does not appear to be statistically significant due to the high variability of the concentration values.

Based on the above, and the fact that there is such a small quantity of sludge relative to the quantity of coke and coal tar produced by the coking process, EPA determined that decanter tank tar sludge recycling, as described here, does not significantly affect the concentration of toxic metals and organic constituents in coal tar or coke (*id.*)

Based on these findings, the Agency exercised its discretion to determine whether the coke and coal tar containing K087 materials should be considered "discarded," and hence solid wastes and concluded that they were not. Hence, EPA excluded the coke product (produced from coal and decanter tank tar sludge K087) and the coal tar mixed with the decanter tank tar sludge from the definition of solid waste. As the Agency stated, these two methods of recycling K087 are not part of the waste disposal problem, but rather can be viewed as part of an ongoing industrial recycling process; *American Mining Congress* v. *EPA*, 907 F. 2d 1179, 1186 (D.C. Cir. 1990).

2. Exclusion of Coking Process

EPA reasoned that it also followed that the coking process should be excluded from any regulation when K087 is used as an ingredient to produce coke. EPA stated that given that K087 is similar to other materials used to produce coke and comes from the same process as these other materials, it would be anomalous to assert RCRA control over the coke oven itself. This form of management is similar to raw materials management and again is "not part of the waste disposal problem." For this reason, EPA excluded coke ovens that process hazardous waste K087 from the applicability of the BIF rule (40 CFR 266.100). EPA also noted that coke ovens are subject to a special regulatory regime under amended section 112(i)(8) of the Clean Air Act, and that RCRA regulation could disrupt the Clean Air Act regulatory scheme. Thus, the Agency decided that RCRA regulation of coke ovens reprocessing K087 materials is not appropriate in any event (id.; see also 56 FR 43875, September 5, 1991).

B. Other Coke By-Product Plant Residues Returned to Coke Ovens

The exclusion from the definition of solid waste provided in the final BIF rule applied only to coke and coal tar produced from hazardous waste K087. This exclusion thus did not extend to coke or coal tar produced from wastes or by-product residues other than K087, nor does it exclude the residues themselves when they are reinserted into coke ovens or mixed with coal tar. These products and residues thus would have been subject to full RCRA regulation (if they exhibit a characteristic of hazardous waste) before reinsertion into the coke oven. These materials (i.e., coke by-product plant residues other than K087 that exhibit the Toxicity Characteristic) are the subject of today's final rule and are discussed further below.

This result appeared unwarranted to EPA because the subject by-products are not significantly different from the K087 materials already excluded. EPA thus proposed to exclude these materials from the definition of solid waste when they are recycled to the coke oven or mixed with coal tar. In that proposal, the Agency proposed several options as to where and how the exclusion could apply (56 FR 35777, July 26, 1991).

EPA also issued an Administrative Stay of the regulatory standards that would otherwise apply to coke ovens that receive residues exhibiting the toxicity characteristic from the coke by-products recovery process (56 FR 43874; September 5, 1991). The primary effect of the stay was to halt the application of RCRA air emission standards to coke ovens when they reprocess coke by-product residues and to give the Agency time to evaluate public comments on the exclusion from the definition of solid waste that was proposed for these residues on July 26, 1991 (56 FR 35787). As a result of the stay, coke oven operators were allowed to continue to recycle coke by-product residues back into their coke ovens without RCRA regulation of the ovens' air emissions pending EPA action on the proposed rule.

Today's final rule differs from the stay in that it does not just apply to the coke production process but instead excludes from the definition of solid waste coke by-product plant residues that exhibit the Toxicity Characteristic, when they are recycled by being returned to coke ovens or mixed with coal tar. By meeting the terms of the exclusion, many materials would not be subject to all portions of the RCRA regulations.

II. Basis for Today's Rule

As discussed in more detail below, the record for this rulemaking establishes clearly that coke by-product plant residues exhibiting the TC are not significantly different from K087 and that these TC by-product residues are recycled to the coke process in ways identical to K087. It is clear to the Agency, therefore, that the regulatory scheme for all materials, when recycled in this way, should be the same. It also appears to the Agency that safe handling of these materials before and during recycling can be assured without full scale subtitle C regulation.

As discussed in more detail below, EPA is thus promulgating an exclusion from the definition of solid waste for K087 and other coke by-product plant residues that are recycled by reinsertion to coke ovens along with coal to produce coke, or that are recycled by mixing with coal tar. The next section describes the coking and tar refining processes that generate these residues.

A. Description of Processes

1. The Coking Process

Coke is manufactured by anaerobic carbonization of coal in high temperature (900–1200°C) coke ovens. Coke is the main product and is used as a reductant in the blast furnaces used in iron manufacturing. Coal tar, light oil, ammonia liquor and coke-oven gas are also generated from the coke ovens. The coke oven gas (COG) is processed through recovery units to separate other saleable by-products from the gas stream and is then used as fuel. Coal tar is typically refined to produce commercial and industrial products including pitch, creosote oil, refined tar, naphthalene, and commercial materials such as bitumen. Figure 1 is a generic process flow diagram of the manufacture of coke and coke by-products. The diagram also indicates the sources of by-product residues that are the subject of this rule.

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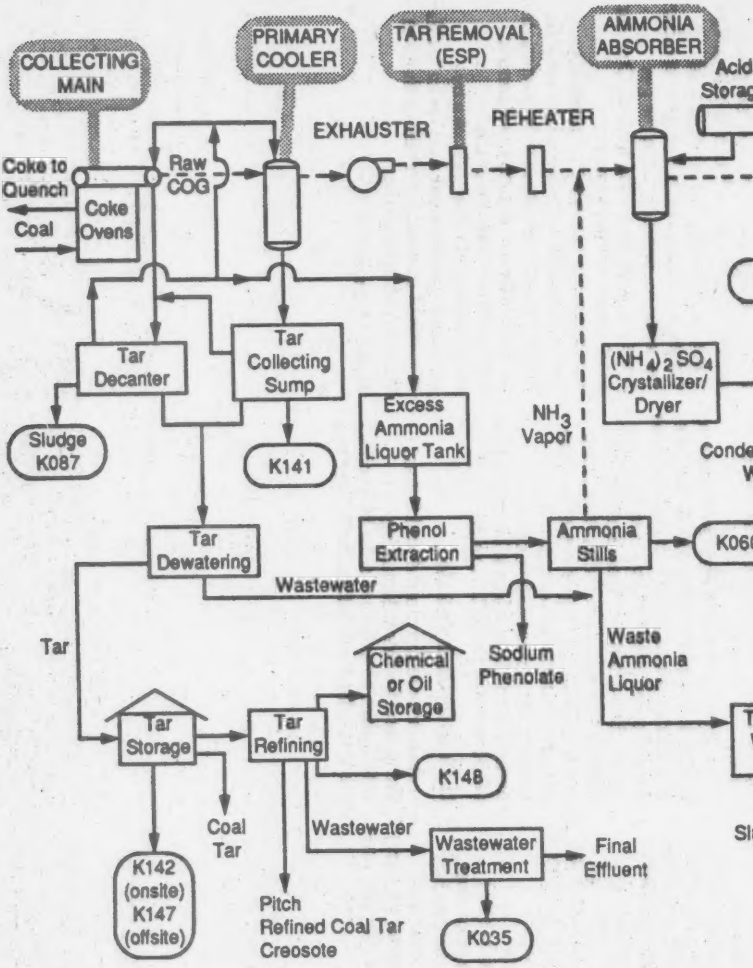

COKE BY-PR

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Figure 1
-PRODUCTS RECOVERY

2. The Tar Refining Process

Coal tar is refined by either batch or continuous distillation into a number of products, including pitch, creosote, naphthalene, and tar acids. The heavy liquid components such as pitch and creosote are sent to a distillation column for further refining. The pitch, which is generated at the softening point of tar, is discharged from the still, cooled, extruded, and poured into barrels or other containers for storage.

B. Description of By-Product Residues and Recycling Processes

Coke by-product residues are generated from separation steps used in the recovery of the by-products described above. At the beginning of the process, during the removal of coal tar, tar residue accumulates in the tar collection sump and at the bottom of tar storage tanks. The most frequent management practice for tar storage tank and tar collecting sump residues, based on information received from 1985 RCRA § 3007 questionnaires and supplemental data submitted in 1987, is recycling the residues to the coke oven. Other management practices for tar storage tank residues include burning the wastes in a boiler, disposing of them in a landfill, or soliciting contractor services for removal of the wastes. The Agency believes that the proportion of wastes being recycled to coke ovens is higher than indicated by the 1987 data due to the potential impact of Land Disposal Restrictions and improvements in recycling technology in this industry.

Naphthalene recovery residues are generated in the final cooling tower, naphthalene separator and collection sumps. These residues are currently managed by recycling them to the tar decanter, the coke oven, or the crude coal tar tank. The light oil recovery process generates wash and light oil residues in the scrubber tower, the stripping still and in a decanter or centrifuge used to separate a polymerized resin referred to as wash oil muck from the recycled wash oil. These wastes are managed in a variety of ways. Over half of the reporting facilities recycle these residues to the coke oven, the tar decanter, the tar sump, or dissolve the residues in the wash oil and recycle them to the light oil recovery process. Some facilities burn the wastes in boilers or use them as fuels, or employ contractors to remove the wastes.

Coke by-product residues that are reinserted into coke ovens or mixed with coal tar usually require prior processing in order to obtain a homogeneous material for recycling purposes. Thirteen of the 34 domestic coking facilities utilize one patented recycling technology, while other facilities use various homogenization techniques such as ball mills. Such techniques can be accomplished without land disposal of the recycled materials.

In the largest-use recycling process, steel hoppers with capacities of one to two cubic yards are used to collect by-product residues. The hoppers are transported using forklifts or trucks and may be placed in "heater huts" (metal sheds heated by steam pipes) prior to processing. The residues are then added, along with a homogenizing agent, to heated batch tanks where grinding and blending occur. The homogeneous liquid is then pumped to a building where it is blended with or sprayed on coal as it moves along a conveyor belt to the coke ovens.

These same homogenization and blending principles are used at facilities equipped with ball mills. At these facilities, the residues are transferred by truck or pipe to a homogenization tank or ball mill. Subsequent holding or mixing tanks may be used to incorporate additional coke by-product residues into the homogenized mixture. The mixture is then applied to the coal as it travels along a conveyor.

The coal tar refining plant may produce two process residuals. The first process waste is coal tar storage tank residuals which are generated at the bottom of the storage tanks prior to the refining process. This is the same process waste that is generated in the coal tar storage tanks at the coke plant. It is thus reasonable to classify this residue as a coke by-product plant residue for purposes of this rulemaking. Certain facilities agitate their tar storage tanks either by mechanical means or with an air agitator to prevent the formation of tank bottoms. However, compliance with the benzene NESHAP requires the replacement or retrofitting of these storage vessels at coking facilities. The tank clean-outs required for this action have generated large quantities of tank residues. Tar storage tank residues are generally mixed with coal and recycled to the coke oven. Facilities that do not produce coke may transport the residues to coking facilities or incinerate or land dispose these wastes. The second process waste from the refining plant is high boiling-point residue which accumulates on the fire tubes and at the bottom of the batch still and must be removed periodically. This waste is referred to as tar distillation residue. The distillation residues may be recycled to the distillation tank along with the crude coal tar or to the coke oven. Other waste management practices include land disposal and removal by contractors. Continuous distillation does not generate any process residues.

Incidentally, in normal by-product plant residue recycling practices, a small amount of by-product residue is used essentially as make up material by adding the residue to a larger volume of coal tar. This is the practice EPA is excluding in today's rule. Mixing wastes generated from the coke by-products processes with a small amount of coal tar is not a recycling process in this industry, and would not meet the terms of the exclusion as stated in this notice. Should this practice occur, the Agency would view it as using coal tar to dilute hazardous waste, not as a recycling practice.

C. Similarity of other Coke By-Product Plant Residues to K087

Coke by-product plant residues are similar in composition to tar decanter sludge (K087) because they are generated from the same process as K087 and are not subject to further processing steps that would alter the chemical composition of the products or by-products. As described above in the process discussion, the first units in the coke oven gas (COG) cleaning process, which directly follow the coke oven, are the primary cooler and the tar decanter. The tar decanter removes particulates containing coal fines from the coal tar and generates K087 sludge.

K087 waste generally contains from six to eleven percent water and from 89 to 94 percent coal tar compounds, which are primarily aromatic hydrocarbons such as those found in pitch, anthracene oil, and light, middle and heavy oils. The volatile organics found in highest concentrations in K087 waste include benzene, toluene and xylene. Semivolatile organics include acenaphthalene, anthracene, benz(a)anthracene, benzo(b and k) fluoranthene, benzo(a)pyrene, chrysene, fluorene, fluoranthene, indeno(1,2,3–cd)pyrene, naphthalene, phenanthrene and pyrene.

The remainder of the coking process consists of by-product purification and recovery operations. The by-products are generated from the coke oven along with the coal tar and originate from the same COG stream that carries the coal tar. The by-product residues that are recycled to the coke oven are primarily generated from distillation columns, separators, and scrubbers used in the recovery of by-products, or sumps and storage tanks used in the process. These by-product residues include process

residues other than K087 from the recovery of coal tar, coal tar storage tank and distillation residuals, sump, distillation and decanter residues from light oil recovery, and naphthalene collection and recovery residues.

To make a listing determination on wastes generated from the coking industry, the Agency evaluated waste composition data obtained from sampling and analysis of by-product waste streams at various coke plants. The organic constituents found in highest concentrations in the by-product waste include benzene, acenaphthalene, anthracene, benz(a)anthracene, benzo(b and k)fluoranthene, benzo(g,h,i)perylene, benzo(a)pyrene, chrysene, fluorene, fluoranthene, indeno(1,2,3-cd)pyrene, naphthalene, phenanthrene and pyrene. These by-product residues are often characteristically hazardous because they exhibit the Toxicity Characteristic for benzene.

The Agency believes that since the by-product residues are generated from the same process as the coke, coal tar, and K087 sludge, and contain the same constituents as other residual streams such as K087, the by-product residues will behave in a similar way, chemically, to K087 when recycled to coke ovens or mixed with coal tar. Furthermore, since the recycling of K087 has been shown not to have a significant effect on the chemical composition of the coke and coal tar products, EPA believes the recycling of by-product residues likewise would not have a significant effect on the chemical composition of these products.

III. Justification for Exclusion from the Definition of Solid Waste

EPA is today adopting final rules providing for an exclusion from the definition of solid waste for coke by-product plant residues that exhibit the TC when these by-products are recycled by being returned to coke ovens either directly or by being mixed with coal tar prior to its refining or sale as a product. This exclusion includes residues from the coal tar refining process, as well as residues otherwise classified as K087 (provided, of course, that these residues are recycled as described above). The exclusions apply subsequent to the point of generation of the residues, and also apply to residues whether or not generated at the site of the coke oven or a tar refiner. Importantly, the exclusion is conditioned on there being no land disposal of the residues at any point from residue generation to reinsertion to the coke oven or tar recovery or refining process. Materials that are stored in piles on the land are thus considered to be solid wastes and are not excluded from regulation. Similarly, materials used in a manner constituting disposal or materials that are incinerated are fully regulated under RCRA subtitle C and all units managing these wastes must meet applicable RCRA regulations. Conditioned in this way, as explained below, the Agency believes the exclusion is a reasonable exercise of its discretion to determine whether materials the by-products residues are "discarded", in the sense of being part of the waste management problem. *American Mining Congress* v. *EPA*, 907 F. 2d at 1186–87 (D.C. Cir. 1990).

The Agency notes further that these materials would become solid and hazardous wastes if they are accumulated speculatively. See 40 CFR 261.2(c)(4) and 261.1(c)(8). This constraint guards against prolonged accumulation without recycling of the residues, a situation that has led to repeated severe damage incidents in other recycling industries. See generally 50 FR 658–61 (January 4, 1985).

A. Exclusion for Residues Generated and Recycled at Coke Oven Site

The exclusion for coke by-product residues rests on the following factors. First, recycling of this material causes no statistically discernible increase in concentration of toxic constituents in the coke ultimately produced, or in the feed to coke ovens (when the by-product residues are added to coke oven feedstock). Second, because the by-product residues are generated from the coking process and are inserted on-site back into that process, the activity itself can be viewed as one continuing process rather than a waste management activity. *American Mining Congress*, 907 F. 2d at 1186. Third, by conditioning the exclusion of no land disposal occurring, the traditional RCRA objectives of absence of land placement of material and general safe handling will be assured. Thus, any of these materials that are placed in land disposal units such as piles are solid and hazardous wastes, and the units are regulated units. (In addition, of course, an abandoned spill of these materials (viz. a spill not picked up expeditiously and used beneficially) constitutes disposal of a hazardous waste. See 45 FR at 76627 (Nov. 19, 1980); 48 FR at 2509–10 (Jan. 19, 1983); 50 FR at 28712–713 (July 15, 1985); and 55 FR at 22671 (June 1, 1990).)

The Agency has also examined the question of air emissions from these various operations in determining whether to exclude the residues. With respect to air emissions from the coke oven itself, not only will net emissions be unchanged by the recycling of these residues (since they are so chemically similar to a feedstock used in any case) but coke ovens are subject to a detailed regulatory scheme under amended sections 112(d)(8) and (i)(8) of the Clean Air Act. These provisions represent a carefully crafted Congressional compromise as to the appropriate level of regulation of air emissions from these units, which compromise would be upended by imposition of RCRA regulation. (For example, the Clean Air Act allows coke ovens to elect a later compliance date with the standards based on residual risk in exchange for meeting increasingly strict technology-based standards [CAA section 112(i)(8)]. These provisions would be undermined if RCRA risk-based standards were now applied. RCRA air emissions standards would appropriately apply, however, if coke ovens were to process hazardous wastes, such as spent solvents, generated from sources other than normal coking and coke by-product operations. The Agency's point here is that where the coke oven is just reprocessing materials from coking and related operations, the Clean Air Act regulatory scheme should operate.) This result would be particularly untoward given the lack of effect of the recycling practice on the air emissions themselves. See RCRA section 1006(b) (integration of RCRA regulations with other regulatory programs administered by EPA).

With respect to air emissions from operations preceding the coke ovens, the Agency also believes that regulatory standards imposed under the Clean Air Act already provide adequate controls. The operations are addressed by the emission standards for benzene waste operations (part of the so-called benzene NESHAP) contained in 40 CFR part 61 subpart FF (subpart FF applies to waste management units (as defined in the subpart instead of RCRA) (§ 61.340(a) and (b)).) The subpart includes standards for tanks, containers, and treatment units. (The Agency has recently agreed to stay the effectiveness of these provisions until clarifying amendments are promulgated. However, the Agency has committed to promulgate the amendments by December 1, 1992.) Given this level of regulatory control, the Agency does not regard these operations as part of the waste management problem.

All of these reasons also apply to the parallel recycling of K087 decanter tank tar sludge, an identical recycling practice involving a practically identical material. The exclusion adopted today thus also applies to K087 subsequent to

its generation, provided that it is recycled in the manner described above and that there is no land disposal of the material during the recycling process.

B. Exclusion of Coke By-products Generated Off-site

With respect to by-product residues generated off-site, many of the same considerations apply. EPA believes that proper tracking of the material can be assured both due to commercial reality of the close relationship of tar refiners to coke oven plants, and, for regulatory purposes, due to the requirement in § 268.7(a)(6) that a notice be kept in facility records documenting that the residues are generated, why they are excluded, and what their disposition is. See also 56 FR 41174 (Aug. 19, 1991). Also, the Agency believes that conditioning the exclusion on there being no land disposal of the residues will prevent the types of land pollution that are the subtitle C program's traditional focus.

With respect to air emissions, although the benzene NESHAP does not apply to off-site operations not classified as coke by-product recovery, the Agency does not view this as warranting classification of the materials as a solid waste when located at such plants (i.e. prior to shipment to a coke oven site). Commenters pointed out that classification of the residues as RCRA hazardous wastes could impede recycling by necessitating use of manifests, further recordkeeping, and possible psychological reluctance to handle the material. Certainly, a waste classification would add a level of regulatory complication, which would likely decrease recycling of this material. Because the environmental benefits of imposing a waste classification appear marginal (as set out above) and because of the reasonable possibility that the classification would impose some burdens on a recycling practice that would result in less of the residues being recycled, the Agency is exercising its discretion so that residues generated off-site are not considered to be discarded, and hence are not solid wastes. This exclusion is conditioned on the residues being recycled in the manner explained above, and conditioned further on there being no land disposal of the residues.

A final point is the explanation of how the exclusion is worded in the regulation. The current exclusion in § 261.4(a)(10), adopted in the February 21, 1991 regulations excludes the coke fuels produced from the recycling practice. Today's regulation omits reference to the products (i.e., coke and coal tar) made from the recycling of hazardous wastes. This is because the exclusion rule excludes the coke by-product residues when recycled, subsequent to the point of generation. Thus, an exclusion for the products made by this recycling process is redundant.

C. Exclusion of Coke By-product Residues Generated at Tar Refining Sites

1. Exclusion of Tar Refining Residues Recycled On-site

Today's regulation also applies to residues generated by tar refiners, as well as to residues generated at coke ovens. As mentioned above, some residues (from fire tubes, tanks, etc.) are recycled at the tar refiner site. The residues are reinserted into the crude coal tar storage tank or into the pitch fraction before it is separated. Products made from the distillation processes include creosote, chemical oils, and pitch. These products of course are not subject to RCRA regulation.

EPA is also excluding these residues from being solid wastes before products are produced. The reasons are similar to these for coke by-product residues. Thus, facilities may recycle tar refining residues to various parts of the tar refining process as long as the recycling process, or any pre-handling, does not involve land disposal. If the residues are accumulated speculatively, spilled without immediate cleanup, they would be solid wastes. In addition, the exclusion applies only to residues from the coke by-products industry used in the tar refining process. Adding non-coke by-product hazardous waste not only has none of the attributes of a closed process (the situation raising jurisdictional limits on RCRA authority), but could have adverse environmental effects by using refined tar to mask unrelated hazardous waste.

2. Exclusion of Tar Refining Residues Recycled Off-site

Several residues from the tar refining portion of the industry are recycled off-site, often by being sent to a coking facility. The residues have constituents similar to K087 and are similarly amenable to recycling to the coke oven. For the reasons stated above, the recycling exclusion published today applies to tar refining materials recycled off-site but within the coke by-products industry.

Again, recycling of these residues must involve no land disposal. Should these materials be land disposed, speculatively accumulated, spilled (at a facility or during transport) and not expeditiously picked up and used, or mixed with hazardous wastes from outside the coke by-products industry, the exclusion will not apply to the materials, and they will be considered solid wastes from the point of generation. By providing an exclusion based on this no land disposal scenario, the Agency believes that the value of the materials can be recovered by the industry in an environmentally responsible manner.

D. Response to Comments

EPA received comments from several industry groups concerning the proposed recycling exclusion. All the commenters supported the general concept of the exclusion from the definition of solid waste for coke by-product residues that are recycled by being returned to coke ovens as a feedstock to produce coke. There was disagreement over the point at which the exclusion should take effect (i.e., at the point of generation of coke by-product residues or at the point of reinsertion of the residues into coke ovens). Many commenters supported an exclusion at the point of generation of the residues. As proposed, the exclusion would have begun at the point of reinsertion of residues into coke ovens. The industry commenters interpreted the proposed exclusion as requiring an RCRA permit for the management of residues prior to the point of reinsertion. They stated that processing of the residues is required before reinsertion to a coke oven or mixing with coal tar. Several commenters contended that an exclusion at the point of reinsertion would have adverse economic effects on the coke by-products industry and associated recyclers (due to the alleged necessity, trouble, and expense associated with obtaining RCRA permits) and would discourage, without any resulting environmental benefit, the recycling of residues that is currently occurring.

EPA believes that the exclusion promulgated today (*i.e.*, that, subject to certain conditions being fulfilled, the exclusion applies after the point of generation) meets these commenters' concerns. In addition, as explained above, the Agency believes further that the exclusion, as conditioned, adequately assures that these operations are conducted safely.

Two commenters expressed concern over the rescission, promulgated in the BIF rule, of the exclusion for coke and coal tar containing K087 at 40 CFR 261.6(a)(3)(vii). The Agency clarifies here that the exclusion for coke and coal tar containing K087 promulgated in the BIF rule at 40 CFR 261.4(a)(10) negates

the need for the exclusion at § 261.6(a)(3)(vii).

Likewise, as explained above, the exclusion promulgated today makes it unnecessary to mention coke and coal tar in the exclusion. In addition, two commenters addressed the issue of unwarranted application of the derived-from rule to by-products of the coking process. They pointed out that the exclusion promulgated in the BIF rule covers only products containing or produced from K087, and does not exclude the hazardous waste prior to that point. This is a concern because other secondary materials from the coking process are reinserted into coke ovens and a strict reading of the regulations would cause these materials to be "derived-from" hazardous waste K087. EPA does not consider marketable by-products of the coking process (*e.g.*, light oil, naphthalene) to be derived from K087 under these circumstances. As stated earlier, to avoid confusion on this issue, the Agency is rewording the exclusion to also exclude K087 beyond the point of generation, when it is recycled to coke ovens or mixed with coal tar subject to the provisions stated in the exclusion.

Another issue raised by commenters that requires some clarification is that of on-site versus off-site recycling. One commenter supported limiting the proposed exclusion for coke by-product residues to residues that are recycled on-site (*i.e.*, at the same site where they were generated). Another commenter suggested expanding the exclusion to encompass off-site recycling of residues. This commenter stated that "there is no controlling judicial precedent that provides a basis for EPA to limit exclusions from the definition of solid waste to on-site recycling situations." The commenter referenced the January 8, 1988 **Federal Register** (53 FR 524) discussion of this topic, wherein EPA noted that no automatic on-site/off-site distinction can be made in terms of assessing whether a particular recycling process qualifies as an on-going manufacturing activity. The commenter has misinterpreted this preamble discussion. EPA actually noted that the existence of on-site recycling is a relevant element in classifying a recycling process as part of an on-going manufacturing operation. However, the Agency believes that the mere fact that recycling takes place on-site does not necessarily mean that the activity is part of an on-going manufacturing process. EPA also stated that "on-site or single generator recycling activities can continue to be characterized by elements of discard and so remain within the Agency's Subtitle C jurisdiction." In other words, EPA does not believe that on-site recycling automatically qualifies a recycling process as part of an on-going manufacturing operation and, therefore, beyond RCRA regulation. EPA makes no reference in the January 8, 1988 preamble to the inclusion of off-site recycling activities in what EPA considers an on-going manufacturing process.

The Agency received several other comments not directly relevant to the generation or recycling of TC hazardous wastes at coke by-products facilities. In many cases, the commenters were concerned with similar materials or past generation and disposal practices. The Agency will respond to such comments in the final listing rule, scheduled for mid-1992.

IV. Relationship to Other Regulatory Programs

A. Toxicity Characteristic

Many of the coke by-product plant residues that are returned to coke ovens with coal exhibit the Toxicity Characteristic for benzene, and are therefore hazardous wastes. Recycling these characteristic hazardous wastes in this way renders the coke oven subject to regulation under the BIF rule. When the resultant waste-derived coke is burned as a fuel, the burning unit is likewise subject to regulation. The exclusion promulgated today, when all its conditions are met, frees these materials and units from regulation under RCRA.

B. Burning of Hazardous Waste in Boilers and Industrial Furnaces

Members of the coke by-products industry have requested that coke by-product plant residues be excluded from the definition of solid waste when they are recycled to coke ovens or mixed with coal tar. Without this exclusion, coke ovens could be deemed to be burning hazardous waste when they reprocess the by-products, subjecting the coke ovens to the full range of RCRA regulations. This request was, in part, accomplished in the BIF rule by the promulgation of the exclusion to the definition of solid waste for recycled K087 (which accounts for most of the waste generation in this industry).

With the promulgation of the recycling exclusion for K087 in the BIF rule, generators became required to furnish, at a minimum, a one-time notification for restricted hazardous wastes subject to the exclusion, according to the provisions of 40 CFR 268.7(a)(6). In the preamble to the rule that clarified this requirement (56 FR 3866, January 31, 1991), the Agency stated what tracking requirements are still necessary for restricted hazardous wastes (such as K087) which meet exclusions to the definition of solid or hazardous waste subsequent to generation. At a minimum, a facility must provide a one-time notification in its operating record that indicates the generation of a restricted waste and its disposition. Such records typically should include the quantities of waste generated, the equipment used to perform the recycling, the location of the process, and a description of the process that shows that the waste meets the terms of an exclusion. Respondents to an enforcement action bear the burden of proof that the material qualifies for the exclusion by demonstrating that there is a known market or disposition for the material, and that it meets the terms of this exclusion (See 40 CFR 261.2(f).).

For wastes generated in the coke by-products industry, generators thus have already had to show that K087 waste is recycled (per the BIF rule exclusion). Should the disposition of the waste change for any reason, the facility must update the notification records accordingly to keep these records accurate. For example, if the materials are no longer recycled, additional Land Disposal Restrictions requirements may apply. For non-listed TC hazardous wastes (other than K087), the Agency will address their restrictions and treatment standards in a future rulemaking scheduled for promulgation later in 1992.

In summary, the recycling of TC characteristic residues does not appear to have a significant effect on the concentration of metals and organic constituents in the final coke and coal tar products. In addition, recycling of these residues will not affect emissions from the coke ovens and blast furnaces. The characteristic residues exhibit strong similarities to coal and coke, and are amenable to the same kind of processing; therefore, the Agency believes it is warranted in determining that these residues, when recycled by being returned to the coke oven or mixed with coal tar, are not discarded when these materials are not spilled or land disposed. As a result, EPA is excluding coke by-product plant residues that are recycled in this way from the definition of solid waste.

V. State Authority

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize qualified states to administer and enforce the RCRA program within the state. (See 40 CFR part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 7003, and 3013 of RCRA, although authorized states have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a state with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that state. The Federal requirements no longer applied in the authorized state, and EPA could not issue permits for any facilities in the state that the state was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the state was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized state until the state adopted the requirements as state law.

In contrast, under section 3006(g) of RCRA, new requirements and prohibitions imposed by HSWA take effect immediately in all states, regardless of authorization status. EPA is directed to implement those requirements and prohibitions in an authorized state, including the issuance of permits, until the state is granted authorization to do so. While states must still adopt HSWA-related provisions as state law to retain final authorization, HSWA applies in authorized states in the interim.

B. Effect on State Authorization

Today's rule is promulgated pursuant to the authority of HSWA. This is because the rule is part of the determination of whether or not to list coke by-product wastes as hazardous pursuant to section 3001(e)(2) (an HSWA provision). In addition, this rule is part of the process of determining the proper scope of the Toxicity Characteristic, so it implements that HSWA provision (RCRA section 3001(h)) as well. Therefore, EPA will implement the provisions of the exclusion promulgated today in authorized states until they modify their programs to adopt this rule and the modification is approved by EPA. A State submitting a program modification may apply to receive either interim or final authorization under section 3006(g)(2) or 3006(b), respectively, for this provision on the basis of requirements that are substantially equivalent or equivalent to EPA's. The procedures and schedule for State program modifications are described in 40 CFR 271.21. It should be noted that all HSWA interim authorizations will expire January 1, 1993.

40 CFR 271.21(e)(2) requires that states having final authorization must modify their programs to include equivalent regulations within a year of promulgation of these regulations if only regulatory changes are necessary, or within two years if statutory changes are necessary. These deadlines can be extended in exceptional cases (40 CFR 271.21(e)(3)). Once EPA approves the modification, the state requirements become Subtitle C RCRA requirements.

Authorized states are only required to modify their programs when EPA promulgates Federal regulations that are more stringent or broader in scope than the authorized state's regulations. For those changes that are less stringent or reduce the scope of the Federal program, states are not required to modify their programs. This is a result of section 3009 of RCRA, which allows states to impose more stringent or broader regulations than the Federal program. The regulations promulgated today at § 261.4(a) are considered to reduce the scope of the Federal program because today's rule excludes certain materials and activities now within the RCRA purview. Therefore, authorized states are not required to modify their programs to adopt regulations consistent with and equivalent to this rulemaking.

Although states are not required to adopt today's rule, EPA strongly encourages states to do so as quickly as possible. As discussed above, on the effective date of the BIF rule, August 21, 1991, many coke oven operators would have been forced to stop recycling coke by-product plant residues back into their coke ovens, absent the Administrative Stay. The Agency want to minimize disruption to legitimate recycling practices currently taking place in the coking industry. The exclusion promulgated today will effectively do this, and authorized states are urged to adopt this provision expeditiously in an effort to promote recycling over waste disposal.

VI. Regulatory Requirements

A. Executive Order No. 12291

Under Executive Order No. 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirements of a Regulatory Impact Analysis. This final rule is not major because it will not result in an effect on the economy of $100 million or more, and it will not increase costs or prices to industry. Rather, this regulation will reduce the overall costs and economic impact of EPA's hazardous waste management regulations by allowing a form of recycling to continue and eliminating possible permitting requirements for certain coke ovens. Because this amendment is not a major regulation, no Regulatory Impact Analysis has been conducted.

B. Paperwork Reduction Act

This rule does not contain any new information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601–612), whenever an Agency is required to publish a General Notice of Rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis (RFA) that describes the impact of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). No RFA is required, however, if the head of the Agency certifies that the rule will not have a significant impact on a substantial number of small entities.

Since EPA has determined the recycling exclusion published here does not affect wastes generated by small entities (as defined by the Regulatory Flexibility Act), and the Agency believes that small entities who handle them will not generate them in significant quantities, this regulation, therefore, does not require an RFA. Accordingly, I hereby certify that this regulation will not have a significant economic impact on a substantial number of small entities.

List of Subjects

40 CFR Part 261

Hazardous waste, Recycling.

40 CFR Part 266

Hazardous waste, Recycling.

40 CFR Part 271

Hazardous waste.

Dated: June 12, 1992.

F. Henry Habicht II,

Acting Administrator.

For the reasons set out in the preamble, title 40 of the Code of Federal Regulations is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, and 6922.

2. Section 261.4 is amended by revising paragraph (a)(10) to read as follow:

§ 261.4 Exclusions.

(a) * * *

(10) EPA Hazardous Waste No. K087, and any wastes from the coke by-products processes that are hazardous only because they exhibit the Toxicity Characteristic specified in Section 261.24 of this part, when, subsequent to generation, these materials are recycled to coke ovens, to the tar recovery process as a feedstock to produce coal tar or are mixed with coal tar prior to the tar's sale or refining. This exclusion is conditioned on there being no land disposal of the wastes from the point they are generated to the point they are recycled to coke ovens or the tar refining process.

* * * * *

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

3. The authority citation for part 266 continues to read as follows:

Authority: Sections 1006, 2002(a) 3004 and 3014 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), 6924, and 6934).

§ 266.100 [Amended]

4. Section 266.100 is amended by removing the note to paragraph (a).

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

5. The authority citation for part 271 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), and 6926.

6. Section 271.1(j) is amended by adding the following entry to table 1 in chronological order by date of publication in the **Federal Register:**

§ 271.1 Purpose and scope.

* * * * *

(j) * * *

TABLE 1—REGULATIONS IMPLEMENTING THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984

Promulgation date	Title of regulation	Federal Register reference	Effective date
*	*	*	*
June 22, 1992	Exclusion from the definition of solid waste for the recycling of hazardous wastes in the coke by-products industry.	(Insert FR page numbers).	June 22, 1992

* * * * *

[FR Doc. 92–14462 Filed 6–19–92; 8:45 am]
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Reader Aids

Federal Register

Vol. 57, No. 120

Monday, June 22, 1992

INFORMATION AND ASSISTANCE

Federal Register

Index, finding aids & general information	202-523-5227
Public inspection desk	523-5215
Corrections to published documents	523-5237
Document drafting information	523-5237
Machine readable documents	523-3447

Code of Federal Regulations

Index, finding aids & general information	523-5227
Printing schedules	512-1557

Laws

Public Laws Update Service (numbers, dates, etc.)	523-6641
Additional information	523-5230

Presidential Documents

Executive orders and proclamations	523-5230
Public Papers of the Presidents	523-5230
Weekly Compilation of Presidential Documents	523-5230

The United States Government Manual

General information	523-5230

Other Services

Data base and machine readable specifications	523-3447
Guide to Record Retention Requirements	523-3187
Legal staff	523-4534
Privacy Act Compilation	523-3187
Public Laws Update Service (PLUS)	523-6641
TDD for the hearing impaired	523-5229

FEDERAL REGISTER PAGES AND DATES, JUNE

23043-23134.....1
23135-23300.....2
23301-23522.....3
23523-23924.....4
23925-24178.....5
24179-24344.....8
24345-24538.....9
24539-24748.....10
24749-24934.....11
24935-26602.....12
26603-26766.....15
26767-26920.....16
26921-27140.....17
27141-27344.....18
27345-27676.....19
27677-27888.....22

CFR PARTS AFFECTED DURING JUNE

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Executive Orders:
12324 (Revoked by EO 12807).....23133
12808 (See EO 12810).....23437
12807.....23133
12808.....23299
12809.....23925
12810.....23437

Proclamations:
4865 (See EO 12807).....23133
6443.....24179
6444.....24935
6445.....26921
6446.....26969
6447.....26981
6448.....27345

Administrative Orders:
Memorandums:
February 10, 1992.....23435
June 15, 1992.....27135
June 15, 1992.....27137
Presidential Determinations:
92-27 of May 26, 1992.....24925
92-28 of May 26, 1992.....24927
92-29 of June 2, 1992.....24539
92-30 of June 3, 1992.....24929
92-31 of June 3, 1992.....24931
92-32 of June 3, 1992.....24933

5 CFR

430.....23043
432.....23043
530.....26603
540.....23043

Proposed Rules:
530.....26619
890.....23126

7 CFR

29.....27347
703.....23908
729.....27141
915.....27347
916.....27348
925.....24351, 24352
932.....24353
947.....24541
966.....27350
980.....27350
981.....27352
998.....24354
1421.....27353
1446.....27141

Proposed Rules:
13.....27371
300.....26620
319.....26620
905.....24384
911.....24385
915.....24386
921.....24388
922.....24388
923.....24388
924.....24388
926.....27373
946.....24561
947.....24562
948.....27375
953.....27376
958.....24390
982.....24563
985.....24391
998.....24392
1007.....27377
1098.....27378
1209.....24720
1703.....26782
1924.....27379
1944.....27379

9 CFR

91.....23046
93.....23048
94.....23927
317.....24542
318.....27870
320.....27870
381.....24542

Proposed Rules:
91.....23066
160.....23540
161.....23540, 27845
162.....23540

10 CFR

19.....23929, 27845
20.....23929, 27845
205.....23929
417.....23931
445.....23931
456.....23931
490.....23931
595.....23523
1001.....23929

Proposed Rules:
Ch. I.....27394
20.....27187, 27771
30.....24763, 27771
32.....27771
35.....24763, 27771
50.....27187
52.....24934
100.....23548, 27006
220.....27395

300.....27395
320.....27395

11 CFR

106.....27146

12 CFR

304.....23931
337.....23933
563c.....26989
571.....26989
611.....26993
1609.....24937

Proposed Rules:

563.....24994
607.....27006
611.....23348, 26786
612.....26787
615.....23348, 26788
618.....27006
627.....23348
700.....24395
1502.....26786
1503.....24994

13 CFR

101.....26767
108.....26769
121.....27677

14 CFR

21.....23523
29.....23523
39.....23049–23053, 23126, 23135, 23526–23530, 24356, 24938–24941, 27146–27157, 27355
71.....24357, 26771, 27158
73.....26771
91.....26764
95.....24358
97.....24181, 24182, 26772
121.....23922
125.....23922
127.....23922
129.....23922
135.....23922, 26764
139.....23126

Proposed Rules:

Ch. I.....23165
21.....23165
23.....23165
39.....23168, 23169, 23549–23553, 23966–23978, 24200, 24201, 24395, 24407, 26629–26631, 26797–26800, 27191–27200, 27712
71.....23126, 23257, 24202, 24412, 24413
382.....23555

15 CFR

771.....26773
778.....26773
799.....26992

Proposed Rules:

303.....24414
Ch. IX.....23067

16 CFR

Proposed Rules:

19.....24996
23.....24996
245.....24996

17 CFR

1.....23136
3.....23136

Proposed Rules:

1.....26801
19.....27713
150.....27202
240.....24415, 26891
270.....23950

18 CFR

1301.....23531

Proposed Rules:

33.....23171, 27511
35.....23171, 27511
284.....26803
285.....26803
290.....23171, 27511

19 CFR

4.....23944, 24942
19.....24942
24.....26775
123.....24942
141.....24942, 27159
143.....24942
145.....24942
148.....24942

Proposed Rules:

101.....26805, 26806

20 CFR

404.....23054, 23155, 23945, 23946, 24186, 24306
416.....23054, 27091

21 CFR

3.....24544
176.....23947
178.....23950
348.....27654
510.....26995
520.....26604
546.....26996
558.....23055, 23953
573.....24187
807.....23059
1308.....23301

Proposed Rules:

146.....23555
163.....23989
314.....27202
334.....23174
341.....27658–27666
601.....27202
880.....27397
890.....27397

22 CFR

1101.....24944

Proposed Rules:

120.....27715
122.....27715
123.....27715
124.....27715
125.....27715
126.....27715
127.....27715
130.....27715

23 CFR

Proposed Rules:

Ch. I.....23460

24 CFR

570.....27116
901.....23953

Proposed Rules:

203.....24424
204.....24424
905.....27716
990.....27716

25 CFR

700.....24363

26 CFR

1.....24187, 24749
60.....27356
602.....27511

Proposed Rules:

1.....23176, 23356, 24426, 26891, 27401, 27716
301.....23356
602.....26891

27 CFR

47.....24188

Proposed Rules:

4.....27401
9.....23559, 27401
24.....23357

28 CFR

32.....24912
43.....27356
541.....23260

29 CFR

502.....27342
1602.....26996
1910.....23060, 24310, 24701, 27160
1926.....24310
2619.....26604
2676.....26605

Proposed Rules:

1602.....27007
1910.....24438, 26001
1915.....24438
1926.....24438

30 CFR

250.....26996

Proposed Rules:

201.....23068, 27008
202.....23068, 27008
203.....27008
206.....27008
207.....27008
208.....27008
210.....27008
212.....27008
215.....27008
216.....27008
217.....27008
218.....27008
219.....27008
220.....27008
228.....27008
229.....27008
230.....27008
232.....27008
233.....27008
234.....27008
241.....27008
242.....27008
243.....27008
935.....23176–23179, 27718
944.....23181

31 CFR

26.....24544
580.....23954

32 CFR

208.....24463
311.....24547
312.....24547
355.....23157
706.....23061, 24548

33 CFR

100.....23302, 23303, 23533, 23534, 23955, 24951, 26606, 27161, 27677–27682
110.....27161, 27682
117.....24189, 24190, 27695
165.....23304, 23534, 24750, 24952, 24953, 27161, 27180, 27682, 27696–27702

Proposed Rules:

100.....23458
110.....23458
117.....23363, 25000–25002, 27719, 27720
155.....27514
165.....23364, 23458, 23561, 24203, 24204, 24444, 27721
323.....26894
328.....26894

34 CFR

97.....27703
201.....24751
212.....27556
222.....27703
298.....27703
301.....27703
303.....27703
304.....27703
305.....27703
307.....27703
309.....27703
315.....27703
316.....27703
318.....27703
319.....27703
320.....27703
324.....27703
325.....27703
326.....27703
327.....27703
328.....27703
330.....27703
331.....27703
332.....27703
333.....27703
338.....27703
347.....27703
350.....27703
356.....27703
361.....27703
425.....24084
426.....24084
431.....24084
432.....24084
433.....24084
434.....24084
435.....24084
436.....24084
437.....24084
438.....24084
441.....24084
445.....27703
460.....24084
461.....24084
462.....24084
463.....24084

464.....24084
471.....24084
472.....24084
473.....24084
474.....24084
475.....24084
476.....24084
477.....24084
489.....24084
490.....24084
491.....24084
600.....27703
642.....27703
643.....27703
644.....27703
645.....27703
646.....27703
652.....27703
668.....27703
671.....24953
682.....27703
690.....27703
722.....27703
770.....27703
791.....27703

Proposed Rules:
769.....26760

36 CFR

1228.....24308

37 CFR

Proposed Rules:
1.....23257
2.....23257

38 CFR

4.....24363
21.....24366, 24367

Proposed Rules:
3.....24446
21.....24447, 26632

39 CFR

111.....27181

Proposed Rules:
111.....23072
3001.....24564

40 CFR

52.....24368, 24378, 24549, 24752, 24957, 26997, 27181
60.....24550
61.....23305
141.....24744
180.....24552, 24553, 24957
261.....23062, 27880
266.....27880
271.....23063, 27880
272.....24757
281.....24759
766.....24958, 27845
799.....24958, 27845

Proposed Rules:
Ch. I.....24765
52.....24447, 24455, 26807, 27723
86.....24457
110.....26894
112.....26894
116.....26894
117.....26894
122.....26894
180.....23366, 24565
185.....23366
230.....26894
232.....26894
260.....24004
261.....24004
262.....24004
264.....24004
268.....24004
281.....25003
401.....26894
721.....23182
763.....23183
799.....24568

41 CFR

Ch. 101.....26606
101-38.....24760

Proposed Rules:
101-2.....24767
105.....23368
106.....23368
107.....23368

42 CFR

400.....24961
405.....24961, 27290
407.....24961
410.....24961
417.....24961
420.....24961, 27290
421.....27290
424.....24961, 27290
488.....24961
491.....24961
498.....24961

Proposed Rules:
412.....23618
413.....23618

43 CFR

Public Land Orders:
6929.....24191
6930.....26607
6931.....26607
6932.....24985
6933.....27000

44 CFR

64.....23159, 27000, 27003
65.....27357, 27359
67.....27361
83.....26775

Proposed Rules:
67.....27406

45 CFR

Proposed Rules:
566.....25004
708.....26634

46 CFR

221.....23470
383.....24191
401.....23955

Proposed Rules:
502.....26809
510.....23563, 24004
515.....24569
520.....23564
525.....24006
530.....24006
550.....23564, 23566, 25005, 26809
552.....25005
553.....25005
555.....25005
560.....24569, 24571
572.....24569, 24571, 26637
580.....23368, 23563, 23564, 23566, 26637, 27413
581.....24220, 26637, 27008, 27413
582.....23563
583.....27413

47 CFR

1.....23160, 23161, 24986
2.....24989
15.....24989
22.....27704
68.....27182
69.....24379
73.....23162, 24544, 27367-27369, 27705
76.....27705
80.....26778, 26779
90.....24192, 24991, 26608, 27184

Proposed Rules:
Ch. I.....24574
1.....24006, 24205
2.....24006
21.....24006
64.....26642
69.....24379
73.....23188, 23567, 24577, 27415, 27416
87.....26812

48 CFR

513.....26608
552.....23163, 26608
710.....23320
752.....23320
2801.....24555
2803.....24555
2804.....24555
2805.....24555
2806.....24555
2807.....24555
2810.....24555
2813.....24555
2817.....24555
2833.....24555
2834.....24555

Proposed Rules:
21.....24720
213.....26814
2401.....24334
2402.....24334
2403.....24334
2405.....24334
2406.....24334
2409.....24334
2413.....24334
2414.....24334
2415.....24334
2416.....24334
2419.....24334
2425.....24334
2426.....24334
2428.....24334
2432.....24334
2433.....24334
2436.....24334
2437.....24334
2446.....24334
2452.....24334
9903.....23189
9905.....23189

49 CFR

544.....23535
571.....23958, 26609
1001.....24380
1201.....27184
1332.....23538

Proposed Rules:
172.....24432
391.....23370
571.....24008, 24009, 24207, 24212
Ch. VI.....23460
659.....24768
1004.....23072
1023.....23372, 27009
1035.....25007
1321.....23568

50 CFR

14.....27092
17.....24192, 27848-27859
227.....23458
611.....27369
642.....27004
663.....23065
672.....23163, 23321-23346, 23965, 24381, 24559, 24992, 26781, 27709
675.....23321, 23347, 24381, 24559, 27185, 27710

Proposed Rules:
17.....24220-24222, 25007, 27203
20.....24736, 27672
216.....27010, 27207
222.....27416
227.....27416
611.....24222
625.....24012, 24577
651.....24013
653.....23199, 26814
663.....24589
672.....27725
675.....24014
678.....24222
683.....26816

LIST OF PUBLIC LAWS

Note: No public bills which have become law were received by the Office of the Federal Register for inclusion in today's **List of Public Laws**.

Last List June 19, 1992

CFR CHECKLIST

This checklist, prepared by the Office of the Federal Register, is published weekly. It is arranged in the order of CFR titles, stock numbers, prices, and revision dates.

An asterisk (*) precedes each entry that has been issued since last week and which is now available for sale at the Government Printing Office.

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Title	Stock Number	Price	Revision Date
1, 2 (2 Reserved)	(869-017-00001-9)	$13.00	Jan. 1, 1992
3 (1991 Compilation and Parts 100 and 101)	(869-017-00002-7)	17.00	[1] Jan. 1, 1992
4	(869-017-00003-5)	16.00	Jan. 1, 1992
5 Parts:			
1-699	(869-017-00004-3)	18.00	Jan. 1, 1992
700-1199	(869-017-00005-1)	14.00	Jan. 1, 1992
1200-End, 6 (6 Reserved)	(869-017-00006-0)	19.00	Jan. 1, 1992
7 Parts:			
0-26	(869-017-00007-8)	17.00	Jan. 1, 1992
27-45	(869-017-00008-6)	12.00	Jan. 1, 1992
46-51	(869-017-00009-4)	18.00	Jan. 1, 1992
52	(869-017-00010-8)	24.00	Jan. 1, 1992
53-209	(869-017-00011-6)	19.00	Jan. 1, 1992
210-299	(869-017-00012-4)	26.00	Jan. 1, 1992
300-399	(869-017-00013-2)	13.00	Jan. 1, 1992
400-699	(869-017-00014-1)	15.00	Jan. 1, 1992
700-899	(869-017-00015-9)	18.00	Jan. 1, 1992
900-999	(869-017-00016-7)	29.00	Jan. 1, 1992
1000-1059	(869-017-00017-5)	17.00	Jan. 1, 1992
1060-1119	(869-017-00018-3)	13.00	Jan. 1, 1992
1120-1199	(869-017-00019-1)	9.50	Jan. 1, 1992
1200-1499	(869-017-00020-5)	22.00	Jan. 1, 1992
1500-1899	(869-017-00021-3)	15.00	Jan. 1, 1992
1900-1939	(869-017-00022-1)	11.00	Jan. 1, 1992
1940-1949	(869-017-00023-0)	23.00	Jan. 1, 1992
1950-1999	(869-017-00024-8)	26.00	Jan. 1, 1992
2000-End	(869-017-00025-6)	11.00	Jan. 1, 1992
8	(869-017-00026-4)	17.00	Jan. 1, 1992
9 Parts:			
1-199	(869-017-00027-2)	23.00	Jan. 1, 1992
200-End	(869-017-00028-1)	18.00	Jan. 1, 1992
10 Parts:			
0-50	(869-017-00029-9)	25.00	Jan. 1, 1992
51-199	(869-017-00030-2)	18.00	Jan. 1, 1992
200-399	(869-017-00031-1)	13.00	[4] Jan. 1, 1987
400-499	(869-017-00032-9)	20.00	Jan. 1, 1992
500-End	(869-017-00033-7)	28.00	Jan. 1, 1992
11	(869-017-00034-5)	12.00	Jan. 1, 1992
12 Parts:			
1-199	(869-017-00035-3)	13.00	Jan. 1, 1992
200-219	(869-017-00036-1)	13.00	Jan. 1, 1992
220-299	(869-017-00037-0)	22.00	Jan. 1, 1992
300-499	(869-017-00038-8)	18.00	Jan. 1, 1992
500-599	(869-017-00039-6)	17.00	Jan. 1, 1992
600-End	(869-017-00040-0)	19.00	Jan. 1, 1992
13	(869-017-00041-8)	25.00	Jan. 1, 1992
14 Parts:			
1-59	(869-017-00042-6)	25.00	Jan. 1, 1992
60-139	(869-017-00043-4)	22.00	Jan. 1, 1992
140-199	(869-017-00044-2)	11.00	Jan. 1, 1992
200-1199	(869-017-00045-1)	20.00	Jan. 1, 1992
1200-End	(869-017-00046-9)	14.00	Jan. 1, 1992
15 Parts:			
0-299	(869-017-00047-7)	13.00	Jan. 1, 1992
300-799	(869-017-00048-5)	21.00	Jan. 1, 1992
800-End	(869-017-00049-3)	17.00	Jan. 1, 1992
16 Parts:			
0-149	(869-017-00050-7)	6.00	Jan. 1, 1992
150-999	(869-017-00051-5)	14.00	Jan. 1, 1992
1000-End	(869-017-00052-3)	20.00	Jan. 1, 1992
17 Parts:			
1-199	(869-017-00054-0)	15.00	Apr. 1, 1992
200-239	(869-013-00055-2)	16.00	Apr. 1, 1991
*240-End	(869-017-00056-6)	24.00	Apr. 1, 1992
18 Parts:			
*1-149	(869-017-00057-4)	16.00	Apr. 1, 1992
150-279	(869-013-00058-7)	15.00	Apr. 1, 1991
*280-399	(869-017-00059-1)	14.00	Apr. 1, 1992
400-End	(869-013-00060-9)	9.00	Apr. 1, 1991
19 Parts:			
1-199	(869-013-00061-7)	28.00	Apr. 1, 1991
200-End	(869-013-00062-5)	9.50	Apr. 1, 1991
20 Parts:			
1-399	(869-013-00063-3)	16.00	Apr. 1, 1991
400-499	(869-013-00064-1)	25.00	Apr. 1, 1991
500-End	(869-013-00065-0)	21.00	Apr. 1, 1991
21 Parts:			
1-99	(869-013-00066-8)	12.00	Apr. 1, 1991
100-169	(869-013-00067-6)	13.00	Apr. 1, 1991
170-199	(869-013-00068-4)	17.00	Apr. 1, 1991
200-299	(869-013-00069-2)	5.50	Apr. 1, 1991
300-499	(869-013-00070-6)	28.00	Apr. 1, 1991
500-599	(869-013-00071-4)	20.00	Apr. 1, 1991
600-799	(869-013-00072-2)	7.00	Apr. 1, 1991
800-1299	(869-013-00073-1)	18.00	Apr. 1, 1991
1300-End	(869-013-00074-9)	7.50	Apr. 1, 1991
22 Parts:			
1-299	(869-013-00075-7)	25.00	Apr. 1, 1991
300-End	(869-017-00076-1)	19.00	Apr. 1, 1992
23	(869-013-00077-3)	17.00	Apr. 1, 1991
24 Parts:			
0-199	(869-013-00078-1)	25.00	Apr. 1, 1991
200-499	(869-013-00079-0)	27.00	Apr. 1, 1991
500-699	(869-013-00080-3)	13.00	Apr. 1, 1991
700-1699	(869-013-00081-1)	26.00	Apr. 1, 1991
1700-End	(869-013-00082-0)	13.00	[5] Apr. 1, 1990
25	(869-013-00083-8)	25.00	Apr. 1, 1991
26 Parts:			
*§§ 1.0-1-1.60	(869-017-00084-1)	17.00	Apr. 1, 1992
§§ 1.61-1.169	(869-013-00085-4)	28.00	Apr. 1, 1991
*§§ 1.170-1.300	(869-017-00086-8)	19.00	Apr. 1, 1992
§§ 1.301-1.400	(869-013-00087-1)	17.00	Apr. 1, 1991
§§ 1.401-1.500	(869-013-00088-9)	30.00	Apr. 1, 1991
§§ 1.501-1.640	(869-013-00089-7)	16.00	Apr. 1, 1991
§§ 1.641-1.850	(869-013-00090-1)	19.00	[5] Apr. 1, 1990
§§ 1.851-1.907	(869-013-00091-9)	20.00	Apr. 1, 1991
§§ 1.908-1.1000	(869-013-00092-7)	22.00	Apr. 1, 1991
§§ 1.1001-1.1400	(869-017-00093-1)	19.00	Apr. 1, 1992
*§§ 1.1401-End	(869-017-00094-9)	26.00	Apr. 1, 1992
2-29	(869-013-00095-1)	21.00	Apr. 1, 1991
30-39	(869-013-00096-0)	14.00	Apr. 1, 1991
40-49	(869-013-00097-8)	11.00	Apr. 1, 1991
*50-299	(869-017-00098-1)	15.00	Apr. 1, 1992
300-499	(869-013-00099-4)	17.00	Apr. 1, 1991
500-599	(869-013-00100-1)	6.00	[5] Apr. 1, 1990

Title	Stock Number	Price	Revision Date
600–End	(869–013–00101–0)	6.50	Apr. 1, 1991
27 Parts:			
1–199	(869–013–00102–8)	29.00	Apr. 1, 1991
200–End	(869–013–00103–6)	11.00	Apr. 1, 1991
28	(869–013–00104–4)	26.00	July 1, 1991
29 Parts:			
0–99	(869–013–00105–2)	18.00	July 1, 1991
100–499	(869–013–00106–1)	7.50	July 1, 1991
500–899	(869–013–00107–9)	27.00	July 1, 1991
900–1899	(869–013–00108–7)	12.00	July 1, 1991
1900–1910 (§§ 1901.1 to 1910.999)	(869–013–00109–5)	24.00	July 1, 1991
1910 (§§ 1910.1000 to end)	(869–013–00110–9)	14.00	July 1, 1991
1911–1925	(869–013–00111–7)	9.00	[6] July 1, 1989
1926	(869–013–00112–5)	12.00	July 1, 1991
1927–End	(869–013–00113–3)	25.00	July 1, 1991
30 Parts:			
1–199	(869–013–00114–1)	22.00	July 1, 1991
200–699	(869–013–00115–0)	15.00	July 1, 1991
700–End	(869–013–00116–8)	21.00	July 1, 1991
31 Parts:			
0–199	(869–013–00117–6)	15.00	July 1, 1991
200–End	(869–013–00118–4)	20.00	July 1, 1991
32 Parts:			
1–39, Vol. I		15.00	[2] July 1, 1984
1–39, Vol. II		19.00	[2] July 1, 1984
1–39, Vol. III		18.00	[2] July 1, 1984
1–189	(869–013–00119–2)	25.00	July 1, 1991
190–399	(869–013–00120–6)	29.00	July 1, 1991
400–629	(869–013–00121–4)	26.00	July 1, 1991
630–699	(869–013–00122–2)	14.00	July 1, 1991
700–799	(869–013–00123–1)	17.00	July 1, 1991
800–End	(869–013–00124–9)	18.00	July 1, 1991
33 Parts:			
1–124	(869–013–00125–7)	15.00	July 1, 1991
125–199	(869–013–00126–5)	18.00	July 1, 1991
200–End	(869–013–00127–3)	20.00	July 1, 1991
34 Parts:			
1–299	(869–013–00128–1)	24.00	July 1, 1991
300–399	(869–013–00129–0)	14.00	July 1, 1991
400–End	(869–013–00130–3)	26.00	July 1, 1991
35	(869–013–00131–1)	10.00	July 1, 1991
36 Parts:			
1–199	(869–013–00132–0)	13.00	July 1, 1991
200–End	(869–013–00133–8)	26.00	July 1, 1991
37	(869–013–00134–6)	15.00	July 1, 1991
38 Parts:			
0–17	(869–013–00135–4)	24.00	July 1, 1991
18–End	(869–013–00136–2)	22.00	July 1, 1991
39	(869–013–00137–1)	14.00	July 1, 1991
40 Parts:			
1–51	(869–013–00138–9)	27.00	July 1, 1991
52	(869–013–00139–7)	28.00	July 1, 1991
53–60	(869–013–00140–1)	31.00	July 1, 1991
61–80	(869–013–00141–9)	14.00	July 1, 1991
81–85	(869–013–00142–7)	11.00	July 1, 1991
86–99	(869–013–00143–5)	29.00	July 1, 1991
100–149	(869–013–00144–3)	30.00	July 1, 1991
150–189	(869–013–00145–1)	20.00	July 1, 1991
190–259	(869–013–00146–0)	13.00	July 1, 1991
260–299	(869–013–00147–8)	31.00	July 1, 1991
300–399	(869–013–00148–6)	13.00	July 1, 1991
400–424	(869–013–00149–4)	23.00	July 1, 1991
425–699	(869–013–00150–8)	23.00	[6] July 1, 1989
700–789	(869–013–00151–6)	20.00	July 1, 1991
790–End	(869–013–00152–4)	22.00	July 1, 1991

Title	Stock Number	Price	Revision Date
41 Chapters:			
1, 1–1 to 1–10		13.00	[3] July 1, 1984
1, 1–11 to Appendix, 2 (2 Reserved)		13.00	[3] July 1, 1984
3–6		14.00	[3] July 1, 1984
7		6.00	[3] July 1, 1984
8		4.50	[3] July 1, 1984
9		13.00	[3] July 1, 1984
10–17		9.50	[3] July 1, 1984
18, Vol. I, Parts 1–5		13.00	[3] July 1, 1984
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18, Vol. III, Parts 20–52		13.00	[3] July 1, 1984
19–100		13.00	[3] July 1, 1984
1–100	(869–013–00153–2)	8.50	[7] July 1, 1990
101	(869–013–00154–1)	22.00	July 1, 1991
102–200	(869–013–00155–9)	11.00	July 1, 1991
201–End	(869–013–00156–7)	10.00	July 1, 1991
42 Parts:			
1–60	(869–013–00157–5)	17.00	Oct. 1, 1991
61–399	(869–013–00158–3)	5.50	Oct. 1, 1991
400–429	(869–013–00159–1)	21.00	Oct. 1, 1991
430–End	(869–013–00160–5)	26.00	Oct. 1, 1991
43 Parts:			
1–999	(869–013–00161–3)	20.00	Oct. 1, 1991
1000–3999	(869–013–00162–1)	26.00	Oct. 1, 1991
4000–End	(869–013–00163–0)	12.00	Oct. 1, 1991
44	(869–013–00164–8)	22.00	Oct. 1, 1991
45 Parts:			
1–199	(869–013–00165–6)	18.00	Oct. 1, 1991
200–499	(869–013–00166–4)	12.00	Oct. 1, 1991
500–1199	(869–013–00167–2)	26.00	Oct. 1, 1991
1200–End	(869–013–00168–1)	19.00	Oct. 1, 1991
46 Parts:			
1–40	(869–013–00169–9)	15.00	Oct. 1, 1991
41–69	(869–013–00170–2)	14.00	Oct. 1, 1991
70–89	(869–013–00171–1)	7.00	Oct. 1, 1991
90–139	(869–013–00172–9)	12.00	Oct. 1, 1991
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156–165	(869–013–00174–5)	14.00	Oct. 1, 1991
166–199	(869–013–00175–3)	14.00	Oct. 1, 1991
200–499	(869–013–00176–1)	20.00	Oct. 1, 1991
500–End	(869–013–00177–0)	11.00	Oct. 1, 1991
47 Parts:			
0–19	(869–013–00178–8)	19.00	Oct. 1, 1991
20–39	(869–013–00179–6)	19.00	Oct. 1, 1991
40–69	(869–013–00180–0)	10.00	Oct. 1, 1991
70–79	(869–013–00181–8)	18.00	Oct. 1, 1991
80–End	(869–013–00182–6)	20.00	Oct. 1, 1991
48 Chapters:			
1 (Parts 1–51)	(869–013–00183–4)	31.00	Oct. 1, 1991
1 (Parts 52–99)	(869–013–00184–2)	19.00	Oct. 1, 1991
2 (Parts 201–251)	(869–013–00185–1)	13.00	Dec. 31, 1991
2 (Parts 252–299)	(869–013–00186–9)	10.00	Dec. 31, 1991
3–6	(869–013–00187–7)	19.00	Oct. 1, 1991
7–14	(869–013–00188–5)	26.00	Oct. 1, 1991
15–End	(869–013–00189–3)	30.00	Oct. 1, 1991
49 Parts:			
1–99	(869–013–00190–7)	20.00	Oct. 1, 1991
100–177	(869–013–00191–5)	23.00	Dec. 31, 1991
178–199	(869–013–00192–3)	17.00	Dec. 31, 1991
200–399	(869–013–00193–1)	22.00	Oct. 1, 1991
400–999	(869–013–00194–0)	27.00	Oct. 1, 1991
1000–1199	(869–013–00195–8)	17.00	Oct. 1, 1991
1200–End	(869–013–00196–6)	19.00	Oct. 1, 1991
50 Parts:			
1–199	(869–013–00197–4)	21.00	Oct. 1, 1991
200–599	(869–013–00198–2)	17.00	Oct. 1, 1991
600–End	(869–013–00199–1)	17.00	Oct. 1, 1991
CFR Index and Findings Aids	(869–017–00053–1)	31.00	Jan. 1, 1992

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[1] Because Title 3 is an annual compilation, this volume and all previous volumes should be retained as a permanent reference source.

[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

[3] The July 1, 1985 edition of 41 CFR Chapters 1–100 contains a note only for Chapters 1 to 49 inclusive. For the full text of procurement regulations in Chapters 1 to 49, consult the eleven CFR volumes issued as of July 1, 1984 containing those chapters.

[4] No amendments to this volume were promulgated during the period Jan. 1, 1987 to Dec. 31, 1991. The CFR volume issued January 1, 1987, should be retained.

[5] No amendments to this volume were promulgated during the period Apr. 1, 1990 to Mar. 31, 1991. The CFR volume issued April 1, 1990, should be retained.

[6] No amendments to this volume were promulgated during the period July 1, 1989 to June 30, 1991. The CFR volume issued July 1, 1989, should be retained.

[7] No amendments to this volume were promulgated during the period July 1, 1990 to June 30, 1991. The CFR volume issued July 1, 1990, should be retained.

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102d Congress, 2nd Session, 1992

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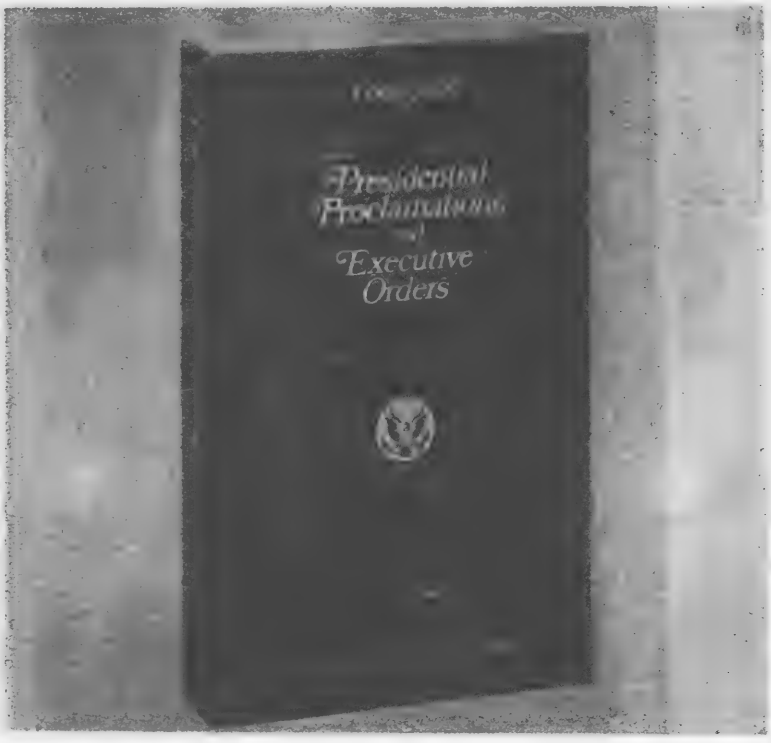

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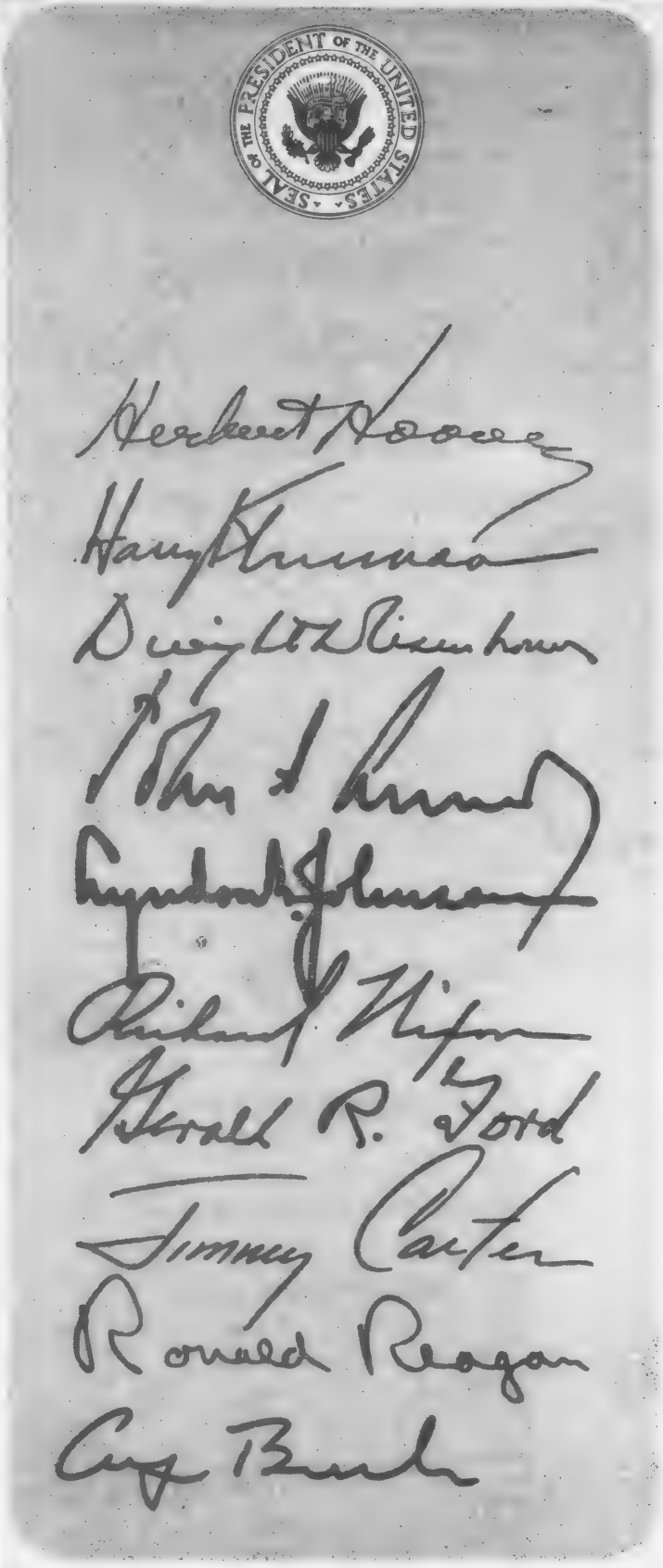

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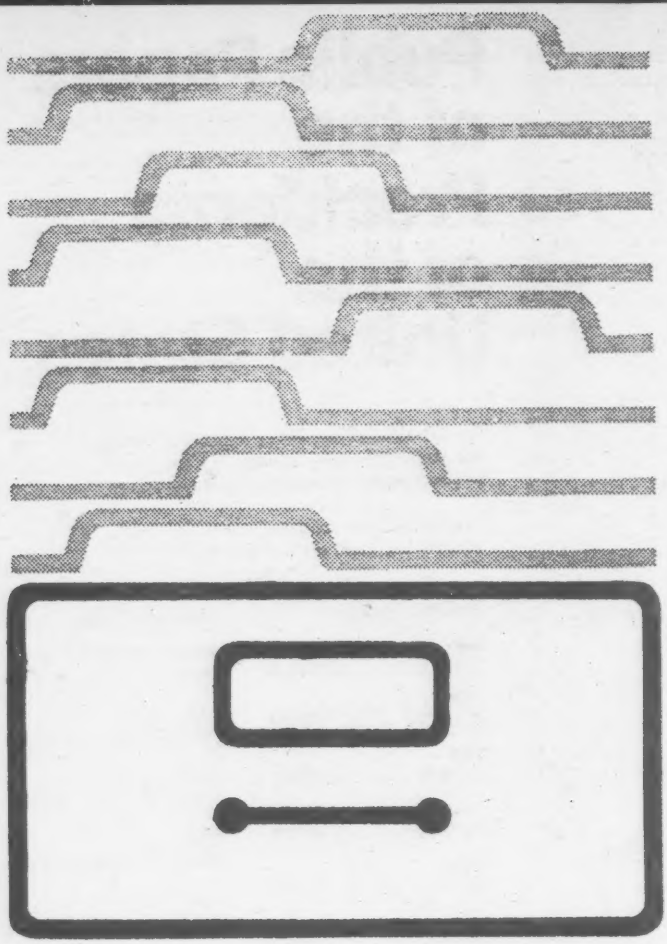

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